Local 233, Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO-CLC *and* Strescon Industries, Inc. and International Union of Bricklayers and Allied Craftsmen, AFL-CIO, and Laborers International Union of North America, AFL-CIO. Cases 4-CD-569 and 4-CD-592

26 August 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Strescon Industries, Inc., hereinafter called the Employer, alleging that Local 233, Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO-CLC, herein called Cement Masons, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by International Union of Bricklayers and Allied Craftsmen, AFL-CIO, herein called Bricklayers, and by Laborers International Union of North America, AFL-CIO, herein called Laborers.

Pursuant to notice, a hearing was held before Hearing Officer Allen K. Neyhard on 16 March 1983. The Employer, Cement Masons, and Laborers appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. On 7 April 1983 Bricklayers, which had not been notified of the hearing, requested that the hearing be reopened. On 18 April 1983 the Regional Director for Region 4 issued an order reopening record and notice of hearing. On 26 April 1983 Bricklayers filed a motion to intervene, to set a date for filing of briefs, and to close the record, wherein it took the position that no further hearing was necessary. On 29 April 1983 that motion was granted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Maryland corporation with its principal place of business located in Baltimore, Maryland, is engaged in the business of manufacturing and erecting prestressed and precast concrete products. During the preceding 12 months, a representative period, the Employer performed services in excess of $50,000 directly to customers outside the State of Maryland. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Cement Masons, Laborers, and Bricklayers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer operates as a manufacturer and builder of precast and prestressed masonry products. The Employer is engaged in performing the grouting and patching of the hollow core of precast concrete panels at the Luthercrest Nursing Home construction site on Hausman Road, Allentown, Pennsylvania. The Employer assigned this work to its employees represented by Bricklayers and Laborers.

The parties stipulated that on or about 23 June 1982 Cement Masons threatened and coerced the Employer with an object of forcing or requiring it to assign the disputed work to employees represented by Cement Masons. The parties further stipulated that on or about 9 March 1983 Cement Masons threatened the Employer with picketing if the Employer failed and refused to reassign the disputed work to it. On 10 and 11 March 1983 Cement Masons engaged in picketing at the Luthercrest construction site.

B. *The Work In Dispute*

The work in dispute involves the grouting and patching of the hollow core of precast concrete panels at the Luthercrest Nursing Home construction site located in Allentown, Pennsylvania.

C. *Contentions of the Parties*

The Employer asserts that its original assignment of the work in dispute to employees represented by Bricklayers and Laborers is supported by the collective-bargaining agreement and its past practice

of assigning the grouting and patching of the hollow core of precast concrete panels to employees represented by Bricklayers and Laborers. The Employer further asserts that, by virtue of their past experience performing the disputed work, bricklayers and laborers have acquired superior skills. Finally, the Employer argues that bricklayers and laborers will perform the disputed work more economically and efficiently.

Cement Masons contends that area practice supports an award of the disputed work to employees it represents. Cement Masons also takes the position that its members possess the skills necessary to perform the disputed work. Cement Masons maintains that its dispute is with Bricklayers only.

Bricklayers and Laborers take the position that their collective-bargaining agreement with the Employer entitles their members to the disputed work, and that the specific provision of that agreement treating the disputed work assigns it to members of their Unions as one unit.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

It is clear from the record summarized above that Cement Masons claimed the work in dispute and threatened to picket and did in fact picket the Luthercrest Nursing Home construction site with the object of forcing the reassignment of work from employees represented by Bricklayers to employees represented by Cement Masons. In addition, the parties stipulated that there is no agreed-upon method for voluntary adjustment of the work in dispute which would bind all parties.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[1] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[2]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

The Employer introduced into evidence an agreement entered into on 10 April 1962 between its predecessor, Baltimore Concrete Plant Corporation, and International Hod Carriers' Building and Common Laborers' Union of America, AFL-CIO, and Bricklayers, Masons and Plasterers International Union of America, the predecessors of Laborers and Bricklayers, respectively.

This agreement specifically discusses the work in dispute. Article IV provides in relevant part:

> It is agreed that Laborers will unload, handle, and place precast, prestressed masonry products. Setting, plumbing, leveling, aligning, pointing, caulking, and grouting and anchoring by any and all means shall be the work of the bricklayers with laborers tending.

Both Laborers and the Employer assert that article IV constitutes a joint assignment of the disputed work to employees represented by Bricklayers and Laborers. Joe Erickson, the Employer's operations manager for Northern and Southern Division, testified that the Employer had assigned the disputed work in accordance with the terms of this agreement, that is, to bricklayers and laborers jointly, since he began working for the Employer in 1973. Erickson further testified that the Employer has never had a contract with Cement Masons.

We conclude that the Employer's agreement with Bricklayers and Laborers favors an award of the disputed work to employees represented by those two Unions.

2. Employer's preference and past practice

The Employer assigned the work in dispute to employees represented by Bricklayers and Laborers. The record reveals that the Employer is satisfied with, and maintains a preference for, this assignment.

Erickson testified that, although the Employer has on occasion hired cement masons, it has not done so for the specific work in dispute in the instant case. On the contrary, it has been the Employer's consistent practice to assign the disputed work to a composite crew of bricklayers and labor-

[1] *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting System)*, 364 U.S. 573 (1961).

[2] *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

ers hired out of Baltimore. Erickson testified that most of the employees who perform the disputed work for the employer are long-term employees. He testified that the bricklayers who are members of this crew have worked for the Employer on the average of 15 years.

Since the Employer operates a multistate operation, it frequently assigns the disputed work to this crew even though it is beyond the jurisdiction of the employees' local hiring hall. When such an assignment is made, the agreement discussed, *supra*, provides that the Employer's employees will receive the same wages and conditions of employment as those in effect for members of the union in the locality in which they are working. In addition, the Employer will sometimes supplement its standard crew with employees referred by the local hiring hall. Thus, in the instant case the Employer's crew includes laborers from both Baltimore and Allentown and bricklayers from Baltimore.

We conclude that the factors of the Employer's preference and past practices support an award of the disputed work to employees represented by Bricklayers and Laborers.

3. Economy and efficiency of operations

Because the Employer regularly employs a composite crew consisting essentially of laborers and bricklayers whom it has hired in the past, that composite crew is able to work in an integrated and interchangeable fashion on the various phases of the disputed work. The record also discloses that this composite crew is able to perform other tasks in addition to the disputed work, which prevents the expense of "idle time." Thus, the composite crew of laborers and bricklayers enhances both the efficiency and economy of operations in the present dispute.

Although cement masons possess the requisite skills to perform the disputed work, they did not demonstrate the flexibility, versatility, and experience with the Employer's operations which the composite crew affords the Employer.

Accordingly the factor of economy and efficiency of operations tends to favor an award of the disputed work to employees represented by Bricklayers and Laborers.

4. Area practice

Erickson testified that the Employer had performed the disputed work in the Allentown area in the past and that on those occasions the Employer had employed bricklayers and laborers. Erickson, however, was unable to specify a particular project by name or date.

Harry Good, business agent for Cement Masons, testified that employees represented by Cement Masons historically have performed all grouting and patching work performed within the Allentown area. He based his testimony on Cement Masons' constitution and his personal observations. Jerome Gearhart, president of Cement Masons Local 233, also testified that the traditional practice in the Allentown area is to assign the disputed work to employees represented by Cement Masons. Both Good and Gearhart specified sites in the Allentown area where cement masons (including themselves) had performed the disputed work. In addition, Good testified that he had never seen a bricklayer performing the disputed work.

Although there is conflicting testimony, we find that the evidence regarding this factor tends to support an award of the disputed work to employees represented by Cement Masons.[3]

5. Relative skills

The record establishes that no special skills are required to perform the work in dispute and that either group of employees possesses the requisite skills to perform such work. We therefore find that this factor is inconclusive and does not favor an award to employees represented by any of the Unions involved.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by Bricklayers and Laborers are entitled to perform the work in dispute. Members of these two Unions are skilled in performing the disputed work and are familiar with the Employer's mode of operation. The assignment of work to bricklayers and laborers reflects the Employer's satisfaction with the quality of their work and is consistent with the Employer's agreement with Bricklayers and Laborers as well as its past practice of at least 10 years. Such an assignment also results in a more efficient operation. Although area practice, normally accorded great weight in construction industry cases,[4] does tend to favor an award to employees represented by Cement Masons, we note that it is the *only* factor favoring such an award. Moreover, given the conflict in testimony and lack of documentary evidence, the record in the instant case does not establish the well-defined area practice which we ordinarily are reluctant to disturb. Accordingly, we

[3] None of the parties introduced documentary evidence to support its position.

[4] See *Carpenters Local 171 (Knowlton Construction Co.)*, 207 NLRB 406 (1973).

find that area practice fails to offset the other relevant factors considered in this case;[5] indeed, those factors, together with the record evidence that the Employer's composite crew routinely moves from jobsite to jobsite within a multistate area, clearly favors an award to employees represented by Bricklayers and Laborers. In making this determination we are awarding the work in question to employees who are represented by Bricklayers and Laborers, but not to those Unions or their members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following Determination of Dispute:

1. Employees of Strescon Industries, Inc., who are represented by International Union of Bricklayers and Allied Craftsmen, AFL-CIO, and by Laborers International Union of North America, AFL-CIO, are entitled to perform the grouting and patching of the hollow core of precast concrete panels at the Luthercrest Nursing Home construction site located in Allentown, Pennsylvania.

2. Local 233, Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO-CLC, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Strescon Industries, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 233, Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO-CLC, shall notify the Regional Director for Region 4, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

[5] In *Carpenters Local 171, supra*, employer preference was the *only* factor in conflict with what was determined in that case to be a well-defined area practice